

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JO-ANN STORES, LLC,

CASE NO. C19-1831JLR

Plaintiff,

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT**

SOUND PROPERTIES, LLC,

Defendant.

I. INTRODUCTION

Before the court is Plaintiff Jo-Ann Stores, LLC’s (“Jo-Ann Stores” or “Tenant”) motion for summary judgment. (MSJ (Dkt. # 28); Reply (Dkt. # 35).) Defendant Sound Properties, LLC (“Sound” or “Landlord”) opposes the motion. (Resp. (Dkt. # 31).) The court has reviewed the motion, the submissions filed in support of and in opposition to

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1 the motion, the relevant portions of the record, and the applicable law. Being fully
2 advised,¹ the court GRANTS the motion.

3 **II. BACKGROUND**

4 Jo-Ann Stores is “the nation’s leading retailer of fabric and crafting supplies.”
5 (Beegle Decl. (Dkt. # 30) ¶ 3.) In 1996, it entered into a commercial lease for premises
6 (the “Premises”) at the Auburn Shopping Center in Auburn, Washington (the “Shopping
7 Center”). (*Id.* ¶¶ 4-5, Ex. 1 (“Lease”)). At that time, Jo-Ann Stores signed the lease with
8 John V. Farrell and Leeann Farrell (collectively, the “Farrells”). (*See id.*) In 2004, the
9 Farrells sold the Shopping Center, and ultimately, Sound bought the property on July 16,
10 2013. (Kirkland Decl. (Dkt. # 33) ¶¶ 4-5.) Around that time, the Shopping Center had
11 various tenants, including a dance studio, laundry and cleaning service businesses, and a
12 financial services business. (Pharmer Decl. (Dkt. # 32) ¶¶ 8-9, Ex. E.)

13 After Sound purchased the Shopping Center, it received an Estoppel Certificate
14 from Jo-Ann Stores, certifying that to Jo-Ann Stores’s knowledge, “the Landlord is not
15 currently in default under the Lease.” (*Id.* ¶ 10, Ex. E (“Estoppel Cert.”) ¶ 4.) However,
16 Jo-Ann Stores stated that it “has not inspected the Shopping Center . . . to verify the
17 Landlord is in compliance with its obligation with respect thereto, and Tenant hereby
18 reserves all rights regarding the same.” (*Id.*) Furthermore, the certification provided that
19 “[n]othing contained herein will . . . waive or estop any claims, defenses, rights or
20 remedies of Tenant[] or . . . relieve the Landlord from any of its obligations under the

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¹ Sound requests oral argument (*see* Resp. at 1), but the court finds that oral argument
would not be helpful to its disposition of the motion, *see* Local Rules W.D. Wash. LCR 7(b)(4).

1 Lease.” (*Id.* ¶ 9.) Jo-Ann Stores “acknowledge[d] that [Sound is] relying upon this
2 Estoppel Certificate and the accuracy of the information contained herein,” but
3 reaffirmed that it “will not be liable to any party for damages of any kind whatsoever . . .
4 resulting from any statement in this certificate.” (*Id.* ¶ 12.)

5 Jo-Ann Stores and Sound executed a “Third Lease Modification and Extension
6 Agreement” (the “Lease”) on November 8, 2013. (Beegle Decl. ¶ 4.) Under the Lease,
7 the fixed minimum rent was \$10,080 per month for February 1, 2019, to January 31,
8 2021. (*Id.* ¶ 6.) The Lease also contained the following covenant of the Landlord:

9 The Shopping Center shall be maintained, operated and managed as a
10 first-class retail project in compliance with all laws, regulations and orders
11 and shall be used and occupied only for normal retail uses customarily
conducted in first-class shopping centers; and in no event shall the Shopping
Center or any portion thereof be used as or for [listing prohibited uses].

12 (Lease § 26(a)(vii).) The parties agreed that in event of breach by Sound, Jo-Ann Stores
13 had the right:

14 (i) to terminate this Lease at any time during the period of such breach;
15 (ii) to pay Substitute Rent during the period of such breach; and/or
16 (iii) to refrain from making any payment of Rent during the period of such
breach provided that business cannot reasonably be conducted from
the Premises on a profitable basis of such breach.

17 (*Id.* § 26(b).) Substitute Rent was defined as \$1,000 per month, invokable on a
18 retroactive basis back to the date the breach first occurred. (*Id.* §§ 14, 38.) The Lease
19 additionally included the following section entitled “No Waiver of Default”:

20 No waiver by either party of any of the . . . covenants . . . and no waiver of
21 any legal or equitable relief or remedy shall be implied by the failure of either
party to assert any rights, or to declare any forfeiture, or for any other reason,
22 and no waiver of any of said . . . covenants . . . shall be valid unless it shall
be in writing signed by both parties hereto. No waiver by either party or

1 forgiveness of performance by either party in respect to one or more tenants
2 of the Shopping Center shall constitute a waiver or forgiveness of
3 performance in favor of Tenant, Landlord or any other tenant, nor shall the
4 waiver or the forgiveness of performance of any one or more of the terms . . .
5 of this Lease be claimed or pleaded by Tenant or Landlord to excuse a
6 subsequent failure of performance of any of the . . . covenants.

7 *(Id.* § 31.) The Lease is governed by Washington state law. (*Id.* § 41.)

8 In November 2018, Sound leased space in the Shopping Center to Ideal Option,
9 PLLC (“Ideal Option”), a “counseling-based business that helps individuals overcome
10 addiction-related problems.” (Kirkland Decl. ¶ 7; *see* Riojas Decl. (Dkt. # 29) ¶ 2, Ex. A
11 (“Ideal Option Lease”.) The lease with Ideal Option specified that Ideal Option:

12 shall use the Premises solely for the purpose of conducting the business of a
13 medical addiction treatment clinic . . . and for no other use without
14 Landlord’s consent.

15 *(Ideal Option Lease* § 5.1.) The lease further specified that Ideal Option “agrees not to
16 use the Premises for the sale of merchandise . . . without Landlord’s prior written
17 consent.” (*Id.* § 5.3.)

18 After Sound leased space to Ideal Option, Jo-Ann Stores notified Sound on
19 December 4, 2018, that Sound was in breach of the Lease, which, it argued, entitled
20 Jo-Ann Stores to pay Substitute Rent retroactive to November 1, 2018. (Beegle Decl. ¶
21 7, Ex. 2; Kirkland Decl. ¶ 8.) Sound responded on December 6, 2018, acknowledging
22 “the occupancy by Ideal Option as a retail counseling and therapy center” but “reject[ing]
23 [Jo-Ann Stores’s] assertion that representations and covenants are not being met” because
24 Sound was “continu[ing] to maintain, operate and manage the [Shopping Center] as a
25 first class retail project.” (Kirkland Decl. ¶ 9, Ex. A at 1.) Jo-Ann Stores replied on

1 January 3, 2019, disagreeing “with the assertion that the addiction treatment center is a
2 retail use that is normally found in first-class shopping centers.” (Beegle Decl. ¶ 8, Ex. 3
3 at 1.) It declared its intent to pay Substitute Rent for so long as Ideal Option continues to
4 operate in the Shopping Center. (*Id.*)

5 The parties continued to correspond over the matter. On March 20, 2019, Sound
6 acknowledged that Ideal Option is “not presently retailing[,] as-such [sic] the Landlord is
7 working closely with them exploring a retail use that they can implement.” (Beegle Decl.
8 ¶ 9, Ex. 4 at 1; *see also* Riojas Decl. ¶ 3, Ex. B at 14 (stating in interrogatory answer that
9 “Ideal Option is primarily a service-based business”)). Sound expressed its “intent to
10 assist [Ideal Option] to institute retail such that there is no technical violation of [the]
11 Lease.” (*Id.*) However, although Sound “attempted to [sic] with Ideal Option to expand
12 its services into retail, including but not limited to supplements and vitamins,” there is no
13 evidence that Ideal Option ever did so. (*See* Riojas Decl. ¶ 3, Ex. B at 14.) Reaching no
14 resolution, Sound threatened to evict Jo-Ann Stores on April 16, 2019, due to outstanding
15 rent of \$45,158.40—the full rent minus the Substitute Rent Jo-Ann Stores had been
16 paying. (Beegle Decl. ¶ 10, Ex. 5 at 1.)

17 To preserve its continued use of the space, Jo-Ann Stores paid the outstanding
18 amount and agreed to pay the full rent moving forward, with the expectation that if a
19 court rules in its favor, it would seek to recover the overpayments. (*Id.* ¶ 11, Ex. 6 at 1.)
20 On April 24, 2020, Jo-Ann Stores provided Sound with a 30-day notice that it will
21 “vacate the Premises and terminate the Lease” due to Sound’s “breach of operating the
22 [S]hopping [C]enter as a ‘first-class retail project.’” (Beegle Decl. ¶ 12, Ex. 7 at 1.)

Jo-Ann Stores based its early termination on its right to terminate the Lease at any time during the period of a breach. (*Id.*; *see* Lease § 26(b).)

Jo-Ann Stores filed suit on November 12, 2019, seeking damages and a declaratory judgment that Sound breached the Lease. (Compl. (Dkt. # 1) ¶¶ 19-31.) In its answer, Sound raised several affirmative defenses, including that Jo-Ann's Stores was estopped from bringing this suit; that it had waived its rights; and that the doctrine of laches barred the suit. (Am. Ans. (Dkt. # 26) at 5.) Sound also brought a counterclaim that Jo-Ann Stores breached the Lease through its early termination. (*Id.* at 6-11.)

III. ANALYSIS

Summary judgment is appropriate if the evidence shows “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is “material” if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is “‘genuine’ only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party.” *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

The moving party bears the initial burden of showing there is no genuine dispute of material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party does not bear the ultimate burden of persuasion at trial, it can show the absence of such a dispute in two ways: (1) by producing evidence negating an essential element of the nonmoving party's case, or (2) by showing that the nonmoving

1 party lacks evidence of an essential element of its claim or defense. *Nissan Fire &*
2 *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party
3 meets its burden of production, the burden then shifts to the nonmoving party to identify
4 specific facts from which a fact finder could reasonably find in the nonmoving party's
5 favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252.

6 The court is "required to view the facts and draw reasonable inferences in the light
7 most favorable to the [nonmoving] party." *Scott v. Harris*, 550 U.S. 372, 378 (2007).
8 The court may not weigh evidence or make credibility determinations in analyzing a
9 motion for summary judgment because those are "jury functions, not those of a judge."
10 *Anderson*, 477 U.S. at 249-50. Nevertheless, the nonmoving party "must do more than
11 simply show that there is some metaphysical doubt as to the material facts Where
12 the record taken as a whole could not lead a rational trier of fact to find for the
13 nonmoving party, there is no genuine issue for trial." *Scott*, 550 U.S. at 380 (internal
14 quotation marks omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
15 475 U.S. 574, 586-87 (1986)).

16 Jo-Ann Stores moves for summary judgment on its breach of contract claim,
17 which would necessarily dismiss Sound's breach of contract counterclaim. (MSJ at
18 9-18.) Sound argues that the Lease is ambiguous and thus, a genuine issue of material
19 fact precludes summary judgment. (Resp. at 9-15.) Furthermore, Sound purports that
20 various affirmative defenses create a genuine issue of material fact. (*Id.* at 15-18.) The
21 court addresses Jo-Ann Stores's breach of contract claim before turning to Sound's
22 affirmative defenses.

1 **A. Jo-Ann Stores's Breach of Contract Claim**

2 When interpreting contracts such as the Lease, the court's primary objective is to
3 "discern the parties' intent." *Supervalu Holdings, Inc. v. Barbara Morris Testamentary*
4 *Tr.*, No. C09-5351BHS, 2010 WL 3947500, at *5 (W.D. Wash. Oct. 6, 2010).
5 Washington follows the "objective manifestation theory of contracts," which instructs
6 courts to determine the parties' intent "by focusing on the objective manifestations of the
7 agreement, rather than on the unexpressed subjective intent of the parties." *Hearst*
8 *Commc 'ns, Inc. v. Seattle Times Co.*, 115 P.3d 262, 267 (Wash. 2005). Courts may
9 "impute an intention corresponding to the reasonable meaning of the words used," *Martin*
10 *v. Smith*, 368 P.3d 227, 230 (Wash. 2005), and "can neither disregard contract language
11 . . . nor revise the contract under a theory of construing it," *Wagner v. Wagner*, 621 P.2d
12 1279, 1283 (Wash. 1980). Generally, courts give words in a contract "their ordinary,
13 usual, and popular meaning," which can be ascertained by reference to standard English
14 dictionaries. *Hearst*, 115 P.3d at 267; *Supervalu Holdings*, 2010 WL 3947500, at *5.
15 "[T]he interpretation of an unambiguous contract is a question of law." *Paradise*
16 *Orchards Gen. P'ship v. Fearing*, 94 P.3d 372, 377 (Wash. Ct. App. 2004).

17 Washington has "recognized the difficulties associated with interpreting contracts
18 solely on the basis of the 'plain meaning' of the words in the document" and thus adopted
19 the "context rule," which allows courts to "examin[e] the context surrounding an
20 instrument's execution." *Hearst*, 115 P.3d at 266. "If relevant for determining mutual
21 intent, extrinsic evidence may include (1) the subject matter and objective of the contract,
22 (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts

1 and conduct of the parties, and (4) the reasonableness of respective interpretations urged
2 by the parties.” *Id.* However, extrinsic evidence cannot be used to “show an intention
3 independent of the instrument” or to “vary, contradict or modify the written word.” *Id.* at
4 267 (quoting *Hollis v. Garwall, Inc.*, 974 P.2d 836, 843 (Wash. 1999)) (internal quotation
5 marks omitted).

6 At issue here is the meaning of the word “retail” as used in the provision that the
7 Shopping Center “shall be used and occupied only for normal retail uses.” (Lease
8 § 26(a)(vii).) “Retail” is defined as “the sale of commodities or goods in small quantities
9 to ultimate consumers.” *Retail*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/retail> (last visited June 2, 2021); *see also Retail*, Oxford English
10 Dictionary, <https://www.oed.com/view/Entry/164142> (last visited June 2, 2021) (defining
11 “retail” as “action or business of selling goods in relatively small quantities for use or
12 consumption rather than for resale”). Courts that have analyzed the term “retail” have
13 consistently interpreted it to reference a place where merchandise or goods are sold. *See*,
14 *e.g.*, *Foremost Dairies, Inc. v. Tax Comm'n*, 453 P.2d 870, 873 (Wash. 1969). To that
15 end, courts have declined to qualify medical clinics as retail entities. *See, e.g.*, *Cutting v. Down E. Orthopedic Assocs., P.A.*, 278 F. Supp. 3d 485, 495-96 (D. Me. 2017)
16 (concluding that “retail sale” does not include “provision of medical services”); *Schultz v. Nalle Clinic*, 444 F.2d 17, 19 (4th Cir. 1971) (“Applying terms normally attributable to
17 the sale of merchandise to the practice of medicine seems contrary to common usage.”).

18 Applied here, there is no dispute that Ideal Option, a clinic that offers medical
19 treatment services for addiction, does not engage in retail because they do not sell

1 merchandise or commodities. (Kirkland Decl. ¶ 7; *see* Ideal Option Lease § 5.1 (defining
2 its business as “medical addiction treatment”).) Indeed, Ideal Option’s lease prohibits the
3 sale of merchandise without the Landlord’s consent. (Ideal Option Lease §§ 5.1, 5.3.)
4 Sound has acknowledged as much, conceding in March 2019 that Ideal Option was not
5 “presently retailing” and attempting to “explor[e] a retail use that [it] can implement.”
6 (Beegle Decl. ¶ 9, Ex. 4 at 1; *see also* Riojas Decl. ¶ 3, Ex. B at 14 (admitting that “Ideal
7 Option is primarily a service-based business”).) Sound offers no evidence that any retail
8 use was subsequently implemented. (*See generally* Resp.; Dkt.) Similar to the courts
9 that have previously considered the applicability of retail to medical clinics, the court
10 concludes that Ideal Option does not participate in “normal retail uses.” *See, e.g.*,
11 *Cutting*, 278 F. Supp. 3d at 495-96; *Schultz*, 444 F.2d at 19.

12 Sound does not dispute the definition of retail as discussed above. (*See* Resp.)
13 Nor does Sound argue that Ideal Option is engaged in a normal retail use. (*See id.*)
14 Instead, Sound pivots and maintains that the term “first-class retail” is ambiguous
15 because it is uncertain and subject to more than one meaning. (*Id.* at 12-14.) In support,
16 Sound cites *Jo-Ann Stores, Inc. v. Property Operating Company, LLC*, 880 A.2d 945
17 (Conn. App. Ct. 2005), in which the court found the term “first-class retail” ambiguous
18 because there is a “reasonable basis for difference of opinion as to what was intended to
19 be included within the term’s definition.” (*Id.* at 12 (citing *Jo-Ann Stores*, 880 A.2d at
20 953).) But the contract in that case did not have the additional language that the premises
21 “shall be used and occupied only for normal retail uses.” *See Jo-Ann Stores*, 880 A.2d at
22 953. The court cannot ignore that language here, which solidifies both the meaning of

1 “retail” and that tenants engage only in retail use as an independent requirement from
2 “first class” use. *See Wagner*, 621 P.2d at 1283; *Bogomolov v. Lake Villas Condo.*, 127
3 P.3d 762, 766 (Wash. Ct. App. 2006) (preferring interpretation that “gives meaning to all
4 provisions”).

5 Sound additionally relies on the “context rule,” arguing that Jo-Ann Stores’s
6 subsequent conduct reveals that the original contracting parties “did not intend [§] 26(vii)
7 to prohibit all non-retail uses.” (Resp. at 14-15.) Specifically, Sound points to the fact
8 that the Shopping Center historically had “a plethora of non-retail tenants/businesses
9 without objection from [Jo-Ann Stores].” (*Id.* at 14.) But the Washington Supreme
10 Court has made clear that extrinsic evidence cannot “vary, contradict or modify the
11 written word” of the contract. *Hearst*, 115 P.3d at 267. And here, Sound’s proposed
12 interpretation through the use of extrinsic evidence directly contradicts the written word
13 of the Lease—namely that the Shopping Center “shall be used and occupied only for
14 normal retail uses.” (*See* Lease § 26(a)(vii).) Again, the court cannot, “under the guise
15 of interpretation,” “rewrite contracts the parties have deliberately made for themselves.”²
16 *See McCormick v. Dunn & Black, P.S.*, 167 P.3d 610, 619 (Wash. Ct. App. 2007).

17 Because § 26 is unambiguous that the Shopping Center be used only for retail
18 purposes, and because there is no dispute that Ideal Option does not engage in retail,
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² Sound also points to the fact that, in another case brought ten years ago against a
21 different landlord in a different state, Jo-Ann Stores “never argues that [another tenant’s] use is
22 ‘non-retail’ in general,” despite the lease having an identical non-retail covenant. (Resp. at 13
(citing *Jo-Ann Stores, Inc. v. Bay-Gard, LTD*, No. 11-CA-05096 (Fla. Cir. Ct. 2011).) The court
places no weight on the legal strategy Jo-Ann Stores may have adopted in a different case a
decade ago.

1 Sound breached § 26 of the Lease with Jo-Ann Stores. Thus, Jo-Ann Stores was entitled,
2 under § 38 of the Lease, to pay Substitute Rent on a retroactive basis back to November
3 1, 2018, when Sound leased space to Ideal Option. (*See* Lease § 38; Kirkland Decl. ¶ 7.)
4 Furthermore, because Sound breached the Lease, Jo-Ann Stores was also entitled to
5 terminate the Lease, thus defeating Sound's breach of contract counterclaim. (*See* Lease
6 § 26(b).) Having resolved the breach of contract claim and counterclaim, the court now
7 turns to Sound's affirmative defenses.

8 **B. Sound's Affirmative Defenses**

9 Sound raises three affirmative defenses of estoppel, waiver, and laches. (Resp. at
10 15-18.) All of the defenses are premised on the fact that Jo-Ann Stores did not object to
11 previous non-retail tenants and signed the Estoppel Certificate in 2013 indicating that the
12 landlord at that time was not in default. (*See id.*) The court finds these defenses
13 unavailing as a matter of law.

14 At the outset, the court notes that the Lease as well as the Estoppel Certificate
15 foreclose the defenses of estoppel and waiver. The Lease contains a nonwaiver clause
16 that states that the failure to "assert any rights" or "to declare any forfeiture" will not
17 imply a waiver and that no waiver shall be valid unless it is in writing signed by both
18 parties. (Lease § 31.) No such writing has been produced. (*See* Resp.) Even if Jo-Ann
19 Stores had waived its rights concerning the tenants in 2013, the nonwaiver clause
20 provides that no waiver "in respect to one or more tenants . . . shall constitute a waiver or
21 forgiveness of performance in favor of . . . any other tenant," nor "shall the waiver . . .
22 excuse a subsequent failure of performance." (Lease § 31.) The Estoppel Certificate also

1 contains a nonwaiver provision that “[n]othing contained herein will . . . waive or estop
2 any claims . . . of Tenant.” (Estoppel Cert. ¶ 9.) Sound makes no argument as to why its
3 estoppel and waiver defenses survive either of these nonwaiver clauses. (See Resp.); *see*
4 *First Un. Mgmt., Inc. v. Slack*, 679 P.2d 936, 940 (Wash. Ct. App. 1984) (upholding
5 nonwaiver clause in lease).

6 Even if the Lease and Estoppel Certificate did not foreclose Sound’s estoppel and
7 waiver defenses, those defenses still fail as a matter of law. Estoppel requires “(1) an
8 admission, statement or act inconsistent with the claim afterward asserted, (2) action by
9 the other party on the faith of such admission, statement, or act, and (3) injury to such
10 other party resulting from allowing the first party to contradict or repudiate such
11 admission, statement or act.” *Wagner*, 621 P.2d at 1284. For “[m]ere silence” to
12 effectuate estoppel, the silence “must have operated as a fraud, must have been intended
13 to mislead, and itself must have actually misled.” *Nickell v. Southview Homeowners*
14 *Ass’n*, 271 P.3d 973, 980 (Wash. Ct. App. 2012). Although Sound points to Jo-Ann
15 Stores’s acknowledgement in the Estoppel Certificate that the Landlord is relying upon
16 the representations within (*see* Estoppel Cert. ¶ 12), it introduces no evidence raising a
17 genuine dispute of material fact that its specific breach—leasing space to Ideal Option—
18 was done on the faith of the Estoppel Certificate, *see Wagner*, 621 P.2d at 1284. Nor
19 does Sound produce any evidence that Jo-Ann Stores’s failure to object to previous
20 tenants amounted to fraud with an intent to mislead. (See Resp.)

21 The same applies to waiver. Waiver is “the intentional relinquishment of a known
22 right” and requires that Jo-Ann Stores “intended to relinquish the right, advantage, or

1 benefit and [its] action must be inconsistent with any other intent.” *Wagner*, 621 P.2d at
2 1283; *see also id.* at 1284 (requiring “unequivocal acts or conduct evincing an intent to
3 waive”). Sound provides no evidence raising a genuine dispute of material fact regarding
4 Jo-Ann Stores’s intent to relinquish the right to assert a breach regarding the tenancy of
5 Ideal Option—an entity that was not at the Shopping Center in 2013. (*See* Estoppel
6 Cert.; Ideal Option Lease.) The evidence in the record suggests the opposite: a month
7 after Ideal Option’s tenancy, Jo-Ann Stores notified Sound that it had breached the Lease.
8 (Beegle Decl. ¶ 7, Ex. 2; Kirkland Decl. ¶ 8.)

9 Sound’s final affirmative defense of laches is equally without merit. Laches is an
10 “extraordinary defense” that is “only appropriate . . . when a party, knowing his rights,
11 takes no steps to enforce them and the condition of the other party has in good faith
12 become so changed that he cannot be restored to his former state.” *Brost v. L.A.N.D., Inc.*, 680 P.2d 453, 456 (Wash. Ct. App. 1984). Barring “highly unusual circumstances,”
13 the court is “generally precluded . . . from imposing a shorter period under the doctrine of
14 laches than that of the relevant statute of limitations.” *Id.* at 455-56. “Mere delay, lapse
15 of time, and acquiescence, standing alone, do not bar a claim short of the statute of
16 limitations.” *Rutter v. Rutter’s Est.*, 370 P.2d 862, 865 (Wash. 1962). Sound has not
17 introduced any evidence of the “highly unusual circumstances” needed for this court to
18 impose a shorter period than the six-year statute of limitations for a breach of contract
19 claim. *See Brost*, 680 P.2d at 455-56; RCW 4.16.040(1); (*see* Resp.) Thus, there is no
20 genuine dispute of material fact that laches does not bar Jo-Ann Stores’s claim.
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1 Because Sound breached the retail provision of the Lease and none of Sound's
2 affirmative defenses are availing as a matter of law, the court grants summary judgment
3 to Jo-Ann Stores on its breach of contract claim. The court additionally grants summary
4 judgment to Jo-Ann Stores on Sound's breach of contract counterclaim and dismisses the
5 counterclaim with prejudice. Jo-Ann Stores is entitled to a damages award of the
6 overpayment plus pre- and post-judgment interest. *See Dautel v. Heritage Home Ctr.,*
7 *Inc.*, 948 P.2d 397, 400 (Wash. Ct. App. 1997) (allowing prejudgment interest as a matter
8 of right when claim is liquidated). Moreover, under the Lease, Jo-Ann Stores is entitled
9 to "all costs, expenses, and reasonable attorney's fees." (Lease § 19(d).) Thus, the court
10 awards Jo-Ann Stores its costs and fees associated with bringing this suit.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the court GRANTS Jo-Ann Stores's motion for
13 summary judgment (Dkt. # 28). The court AWARDS Jo-Ann Stores \$173,872 plus
14 pre- and post-judgment interest. The court additionally ORDERS Jo-Ann Stores to file a
15 motion for costs and fees within 14 days of this order.

16 Dated this 7th day of June, 2021.

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18 _____

19 JAMES L. ROBART
20 United States District Judge
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